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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 709

SAFE HARBOR WATER POWER CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR SAFE HARBOR WATER POWER CORPORATION, PETITIONER

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May 9, 1950.

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Statement

The brief for the Federal Power Commission, filed in opposition to Petitioner's brief accompanying its petition for certiorari in this proceeding, requires, in the opinion of Petitioner's counsel, a short reply. Although the Commission asserts that no questions of general importance are presented here, it is submitted that the very cogency of the Commission's arguments indicates that important questions are involved which should be settled by the decision of this Court. The Court below has invited review (R. 4578) and has conceded that its views are at variance

with those expressed by two other courts (R. 4577). In addition, the indecision of the Commission itself, in proceeding against the Petitioner in the first instance under Part I alone (cf. Respondent's Brief, pages 4 and 5) and in proceeding here under both Parts I and II, indicates not only the necessity for clarification of the question whether Part II is applicable to licensees engaged in interstate operations, but also that there is serious doubt as to the inability of the states to agree so as to confer regulatory jurisdiction on the Commission under Part I.

1. Interpretation of the Act.

(a) Respondent relies upon an excerpt from H. Rep. No. 1318, 74th Cong., 1st Sess. to support its argument that the legislative history of the Federal Power Act of 1935[1] (the Act) indicates a Congressional intent to include licensees within the regulatory provisions of Part II. This excerpt, which appears in the analysis of Part III of the Act, is the only scrap of evidence in the entire legislative record which might be deemed to suggest such a conclusion, and is at variance with every other indication of the intent that licensees should be regulated under Part I exclusively.

Furthermore, a reading of a portion of the testimony at the hearing on Senate Bill S-1725, held April 19, 1935 before the Senate Committee on Interstate Commerce (74th Congress, 1st Sess.) discloses that the change of language in Sec. 305(a), to which the quoted excerpt referred, was based upon the testimony of Dozier A. DeVane, Solicitor of the Federal Power Commission. To understand the significance of Mr. DeVane's testimony, a further amplification than that presented by the Respondent is required.

1. 49 Stat. 838, 16 U.S.C. 791 a, et seq.

At the start of his testimony (233), Mr. DeVane attempted to explain the structure of the bill then before the Senate (S. 1725). He explained that pages 70 to 104 were amendments to the Federal Water Power Act and were included in Title II, and that a "second title II" commenced at page 104 and provided for the regulation of the transmission and sale of electric energy in interstate commerce. Title III contained "administrative provisions applicable to both titles II beginning on pages 78 and 104." Mr. DeVane was asked if the proposed amendments to the Water Power Act were necessary in order to make Title I of the Bill (dealing with public utility holding companies) effective. The following discussion ensued: (233-234)

> (Senator Hastings) "I thought it was all one subject.
>
> "The Chairman: No. We have been dealing entirely up to this time, I mean, with the holding company situation, Title I of the bill.
>
> "Mr. DeVane: It is all one subject. They all relate to the electrical industry. But Title I of the bill deals with the holding company side of the matter and the second Title II deals with operating companies.
>
> "Now, in that connection, I should like to say that among the operating companies are those companies that now have licenses from the Federal Power Commission under the Federal Water Power Act. There are certain amendments that should be made to that act. When you begin to deal with holding companies on the one side, and with operating companies on the other, and you have as a part of those operating companies licensees under the Federal Water Power Act, it appeared obvious that the time to take care of the necessary amendments

to the Federal Water Power Act was the same time."

It seems clear that a reading of Mr. DeVane's testimony in full indicates precisely the opposite conclusion from that which the Respondent would reach. Mr. DeVane quite evidently was only attempting to explain why it was appropriate to embody amendments of the Federal Water Power Act in the one Bill. He did not say that licensees are public utilities, but only that "among the operating companies" are licensees and that, therefore, it was an appropriate time to amend the Water Power Act relating to licensees.

Mr. DeVane clearly recognized two types of operating companies, one type being licensees under the Federal Water Power Act and the other type being operating companies as to which the regulatory provisions of "second Title II" was directed. His intention to deal with regulation of licensees by making the "necessary amendments to the Federal Water Power Act" is abundantly clear. Conversely there was no intention to deal with licensees under Part II.

It is furthermore noteworthy that Mr. DeVane, who, as Solicitor of the Commission, had been largely instrumental in the draftsmanship of the Bill, failed to suggest any change in the regulatory provisions of Section 20 of the Water Power Act. Since, in his position, he must undoubtedly have been aware that the jurisdiction of the Federal Power Commission to regulate the interstate rates of licensees was expressly conditioned in Section 20 upon a failure of the states to provide regulatory machinery or upon an inability to agree, it is inconceivable that had he intended to suggest that the Commission have unconditional authority to regulate the rates of such

licensees under Part II, he would not have proffered an appropriate amendment.

(b) Petitioner and Respondent are in accord that the purpose of the enactment of Part II of the Act was to close the gap indicated by the decision of this Court in the *Public Utilities Commission* v. *Attleboro Steam & Electric Co.,* 273 U. S. 83. For this reason, the declaration of policy expressed in Section 201(a) establishes that federal regulation is to extend only "to those matters which are not subject to regulation by the States."

Licensees, who are engaged in operations in more than one state, are, however, expressly made subject to regulation by such states under Section 20 of the Act. *Safe Harbor Water Power Co.* v. *Federal Power Commission,* 124 F. 2d 800, cert. den. 316 U. S. 663. There is, therefore, no regulatory gap with respect to such licensees and the regulation of such licensees is apparently a matter "subject to regulations by the States" and consequently without the express scope of Part II.

(c) Respondent attempts to refute Petitioner's emphasis on the careful use of the word *Part* throughout the Act with the observation that Petitioner's contention is based upon the assumption that regulation under Parts I and II is mutually exclusive. In fact Petitioner's contention is that Parts I and II must be mutually exclusive to be consistent.

Respondent, moreover, is simply begging the basic question as to whether or not the two Parts are mutually exclusive. Petitioner contends that the draftsmanship in segregating in Part I the regulatory provisions dealing with licensees, and in segregating in Part II the regulatory provisions dealing with public utilities, and at the same time combining in Part III the administrative provisions

dealing with both categories, but stating in each instance which of the sections of Part III are to apply to both licensees and public utilities, indicates an intent that Parts I and II should be mutually exclusive. No other conclusion is consistent with the language employed.

2. The Conflicts Between Parts I and II.

(a) Respondent concedes a potential conflict between federal and state regulatory authority if Parts I and II should both be held applicable to licensees engaged in operations in more than one state. It suggests, however, that determination of this issue should be deferred since federal regulation is here allegedly established by the failure of the states to agree. Petitioner believes that the question should be resolved because of its obvious importance in the field of Federal Power Commission regulation and further because there is no substantial evidence to support the Commission's conclusion that the States of Pennsylvania and Maryland, in this instance, have been unable to agree.

Respondent seems to argue that because no action was taken by the two states concerned after its first order reducing Petitioner's rates was set aside by the Federal Power Commission, it is indicated that the two states could not agree as to cooperative regulation. It should be noted that the period between the termination of the first proceeding and the institution of the present case on September 1, 1944 were war years. During that period the manpower and the energies of the State Commissions were directed largely to activities directly concerned with the war effort. At best, however, the inaction of the states would indicate a failure to agree with the regulatory theories of the Federal Power Commission. Nothing in the Federal Power Act of 1935 or in its predecessor, the

Federal Water Power Act, indicates that agreement in regulatory philosophies of the states with that of the federal body is mandatory.

Furthermore, even if, as Respondent suggests, the states should remain inactive for a period of years, the result would not be to "emasculate" rate regulation under Section 20. Safe Harbor is a wholesaler of electric energy. The interest of the states in its rates is limited to the effect that such rates may have upon the rates of its customers who are engaged in serving the ultimate consumer in the states concerned. Inaction by the State Commissions would, therefore, mean only that the State Commissions were satisfied with the rates to the ultimate consumer in their respective jurisdiction. This is certainly a matter within the prerogative of the State Commissions.

Furthermore, any excess earnings which Safe Harbor might realize are subject to regulation by the Commission in accordance with Section 10(d). Inaction by the states over a period of years would, therefore, not emasculate rate regulation under Section 20, but would, on the contrary, foster the Congressional intent to allow the states to protect the consumers within their own jurisdiction and yet to prevent excessive profits to licensees by means of federal control.

The primary question, however, may be resolved by the plain language of the Act. It requires the inability of the states to agree as a condition precedent to federal jurisdiction. Inability to agree is not shown, as here, by the continued and reiterated offer of one state, Pennsylvania, to cooperate and by the admission of the other state, Maryland, that "the State Commissions are ready to engage in cooperative regulation" (R. 4584).

(b) Whether or not Section 20 of the Act requires a "net investment" rate base in proceedings, which the Commission is authorized to conduct under that Section, is a question of too great importance to remain longer unresolved. Petitioner, for the reasons stated in the argument accompanying the petition for certiorari, contends that the net investment rate base, as defined in Section 3(13) of the Act is required in Section 20 proceedings. This is in accordance with the views of two U. S. Courts of Appeals. *Niagara Falls Power Company* v. *Federal Power Commission,* 137 F. 2d 787, 792, 793, cert. den. 320 U. S. 792. *Alabama Power Company* v. *Federal Power Commission,* 128 F. 2d 280, 293. The court below held otherwise. A final determination of this question by this Court should, it is submitted, be made at the earliest opportunity.

If a "net investment" rate base is required in Section 20 proceedings, it is submitted that without willfully distorting the language of Section 3(13) it cannot be argued that normal depreciation charges accrued in the depreciation reserve may be deducted in determining net investment unless such charges have been accumulated out of earnings, after depreciation expense, in excess of a fair return.

Petitioner's argument that different accounting principles prevailed in 1920 when the Federal Water Power Act was enacted is utterly untenable. Depreciation has been recognized as a proper deduction from operating expenses to arrive at "earnings or profits" since the decisions of this Court in the *Knoxville* v. *Knoxville Water Company,* 212 U. S. 1, 13, 29 S. Ct. Rep. 148 (1909). Furthermore, it is so specifically recognized in Regulations 16 and 17 of the Rules and Regulations governing the administration of the Federal Water Power Act, 3rd

Revised Edit., in effect at the time the Safe Harbor's license was issued in 1930 and specifically incorporated in and made a part of such license contract. Inviolability of the license contract is protected both by Section 28 of the Act and Article 27 of the license (R. 3508(a)).

CONCLUSION

It is respectfully submitted that the petition for a Writ of Certiorari should be granted.

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May 9, 1950.